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IN THE

Supreme Court of the United States

October Term, 1957.

No. 293.

THE NATIONAL DRYING MACHINERY COMPANY,
Petitioner,

vs.

JACK ACKOFF and NATIONAL DRYER MANUFACTURING CORPORATION, and NATIONAL DRYER SALES CORPORATION (World Dryer Corporation, Successor in Interest, Substituted),
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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III. QUESTION PRESENTED.

Whether, in a civil contempt proceeding, where the complainant may recover only compensation for harm suffered, the Court of Appeals was not correct in refusing an award to a complainant that claimed no injury whatsoever, either tangible or intangible.

V. STATEMENT OF THE CASE.

(In addition to Petitioner's "Statement of the Case".)

In the Petition for civil contempt filed by the complainant there was neither an allegation of any damage suffered nor any loss of profits. At the hearing the petitioner offered no evidence of any damage or loss of profits.

Judges Hastie, Kalodner and McLaughlin heard the case on appeal. The Petition for rehearing was considered by the full bench of seven judges, including Judges Biggs, Maris, Goodrich and Staley. The Petition was dismissed, Chief Judge Biggs and Judge Maris dissenting.

VI REASONS FOR OPPOSING THE GRANT OF THE WRIT.

(1) *The decision of the Court of Appeals is not in conflict with the decision of this Court in Leman v. Krentler-Arnold Co., 284 U. S. 448.*

The *Leman* case was a civil contempt proceeding for violation of an injunction granted in a patent infringement suit. The contemnor, who made hinges for shoe lasts and sold them to manufacturers of shoe lasts, had been enjoined from making, using or selling the hinge patented by the complainant, a shoe last manufacturer that made its own hinges. Although the complainant did not sell its hinges to other shoe last manufacturers, it competed with those manufacturers in selling lasts to manufacturers of shoes. Those lasts equipped with complainant's "ingenious device" possessed a substantial competitive advantage over others, see 300 F. 834, 837, and the infringement had naturally resulted in lost profits for the complainant, which had been prevented from increasing its sales because the infringement had permitted its competitors to market the self-same product. Accordingly, to compensate complainant for the economic losses due to the original infringement, the District Court had granted it, in addition to injunctive relief, the profits that the infringer had made as a result of the infringement.

For the same reason, when the injunction was violated by continued infringement, the district judge ordered the contemnor to account for profits made through sales of the device during the period of violation. The Court of Appeals in the *Leman* case, however, held that the complainant could not recover profits as appropriate remedial relief for the obvious economic losses caused by the continued illegal sale of its device to its competitors.

The Supreme Court reversed this decision. It held that "there is no necessary exclusion of profits from the idea of compensation in a remedial proceeding." 284 U. S. at 457. In other words, where compensation is required to make the complainant whole—where there has been economic injury, even though not readily provable in dollars and cents—profits may be the measure of the award to the injured party.

But there must be some interest of complainant's that requires compensation—some loss to him—before the *Leman* case can be invoked. As the Court there observed, "a proceeding for civil contempt is for the purpose of compensating the injured party." 284 U. S. at 455. *Leman* relieved the injured party from reducing his injury to dollars and cents damages; it did not hold that a party that has suffered no injury whatsoever, whether tangible or intangible, may recover profits. The Court could not have so held, for that was not the case then before it. That case is now before it. Petitioner is asking this Court mechanically to extend *Leman* to award it profits even though respondent's conduct has in no way affected its sales, its reputation or its good will. Certainly this goes far beyond this Court's understanding of *Leman*. See *United States v. United Mine Workers*, 330 U. S. 258, 304, where the Court relied on *Leman* as authority for the proposition that a fine payable to the complainant in a civil contempt proceeding "must of course be based upon evidence of complainant's actual loss." As Judge Hastie said for the Court of Appeals:

> "* * * the *Leman* case does not relieve the complainant of showing that the contemptuous conduct did, in fact, have substantial injurious effect upon his economic interest. This conception is particularly important here because in the original disposition of the present petitioner's trademark infringement claim it appeared to the district court that the plaintiff had suffered no economic injury from the trademark infringement and that there was not 'any real danger of the plaintiff's

> product being brought into disrepute by the defendant's use of the name * * *." 129 F. Supp. at 391. * * * There is no suggestion in the present proceeding that this absence of economic injury has been changed by the contemptuous conduct of the defendants." See Appendix to Petition, pp. 16-17.

This absence of the economic injury essential to the application of the *Leman* rule sharply differentiates the instant case from *Leman* and makes evident that the refusal of the Court of Appeals to sanction an award of profits is attributable, not to a conflict with a decision of this Court, but to significantly differing circumstances.

2. *The decision of the Court of Appeals is clearly correct.*

The purpose of a civil as distinguished from a criminal contempt proceeding is to "enforce compliance with an order of the Court or to compensate for loss or damage sustained by reason of non-compliance". *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 191. "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss * * *." *United States v. United Mine Workers, supra.* This fundamental limitation upon the recovery permitted the complainant—that he show some loss incurred, some damage suffered, even though it may be incapable of precise calculation—is inherent in the compensatory nature of the proceeding. Judge Hastie, speaking for the court below, stated:

> "Whether an award in civil contempt be measured in terms of a plaintiff's loss or a defendant's profit, such an award, by very definition, must be an attempt to compensate plaintiff for the amount he is out of pocket or for what defendant by his wrong may be said to

have diverted from the plaintiff or gained at the plaintiff's expense. Unless this limitation is recognized, a requirement that one party turn his profits over to his adversary itself becomes a punitive rather than a compensatory imposition." Appendix to Petition, pp. 15-16.

Petitioner not only failed to show any injury resulting from respondent's conduct, it did not even claim the existence of such injury. Indeed, it could not have. Petitioner and respondent are not remotely in competition with each other, since they sell very different products. See 129 F. Supp. 389, 391. Moreover, as the Court of Appeals observed, the District Court found that respondent's conduct represented no danger to the reputation of petitioner's product. In these circumstances, there can be no such thing as compensation, for there is nothing to compensate for. Accordingly, an accounting for profits, which is what the sum arbitrarily fixed by the district judge is said to represent, is entirely unwarranted. Cf. *Triangle Publications v. Rohrlich*, 167 F. 2d 969, 973-4 (C. A. 2, per Augustus Hand, J.); *Hanson v. Triangle Publications*, 163 F. 2d 74, 79-80 (C. A. 8); Restatement of the Law of Torts, Sec. 747.

The *Leman* case made clear that a proceeding for civil contempt for violation of an injunction is part of the main cause. 264 U. S. at 454. In the main cause there, an accounting for profits was upheld because of the patent holder's obvious loss resulting from the infringement. An accounting was deemed appropriate by this Court in the contempt proceeding for the same reason. The economics of the situation had remained unchanged—in both instances the patent owner had suffered harm.

Conversely, in the main cause of the present case, the District Court held that an accounting could not be justified, "there having been no proof whatever of any damages." Appendix to respondent's brief in the Court of Appeals, pp. 6a-7a. Yet, although there was no suggestion in the contempt proceeding that this absence of economic injury had been changed by respondent's conduct, the District

Court ordered respondent to pay petitioner a fine of $5,000. It was this award that the Court of Appeals properly refused to sanction. The rationale of its opinion was that, since there was no basis for an accounting in the main cause, there was none in the contempt proceeding, for in neither case did petitioner suffer any loss. And if the fine was designed, as it apparently was, to punish respondent for a willful wrong (see the District Court's opinion on rehearing the contempt case, Appendix to Petition, p. 12), it could not be upheld consistently with the vital distinction between criminal and civil contempt. This decision is manifestly correct.

(3) *The question presented is important only to the petitioner.*

Petitioner, a private litigant disgruntled over failure to obtain a windfall, attempts to approach this Court as the champion of the public interest. It urges the Court to review the Third Circuit's vacation of an award of respondent's profits because there was a dissenting opinion below with respect to the denial of a rehearing *en banc*. Petitioner argues that, since one dissent may lead to another and since the problem might at some future time become important, the Court should settle it now. One must search the statutes, rules and decisions governing the certiorari jurisdiction of this Court in vain for support for such a view. If it were, all disappointed litigants would seek this Court's review. Standing at the apex of our federal judicial system, this Court, of necessity, has been required to devote its resources to the vital legal problems of society, those of federalism, the separation of powers, the Bill of Rights, the administration of federal criminal justice, to name but a few, and to questions of statutory construction imperatively in need of authoritative determination.

No "special and important reasons" exist for reviewing the question presented in this case. See Rule 19(1) of the

Rules of the Supreme Court. Ever since *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, it has been clear that the complainant in a civil contempt proceeding is entitled to no more than compensation for harm suffered. This case merely involves the application of this unquestioned legal principle to the virtually unique situation where a private litigant who complains of contempt makes no effort whatever to show economic injury. Significantly, petitioner does not point to one other case involving the precise question before the Court in all the twenty-five years that have passed since the *Leman* decision.

CONCLUSION.

There is no conflict of decision. The decision below is plainly correct. And the question presented is important only to the petitioner, since the law is settled and the facts of this case are virtually unique. In these circumstances, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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